Legislative Failure and Reform

ONE of the most disturbing phenomena to the student of government is the modern decay of the power and reputation of legislatures. The evidence of decline is wide-spread. It is true of the British House of Commons no less than of the American Congress, of the French Chamber of Deputies as of American state legislatures. The general complaint is that the quality of representatives chosen has lowered, that purely local interests determine the votes of members, and that executive power has everywhere grown at the expense of the legislature.

In American state government the diminution of legislative power has been going on for many years. It began with the imposition of constitutional restraints upon the legislature's action, and particularly with the prohibition against special laws. Drafters and amenders of state constitutions have proceeded further and further in creating new limitations, until now the typical American state legislature finds its freedom curtailed in a great variety of ways. As field after field of legislation passes, by constitutional restriction, beyond the jurisdiction of the legislature, the necessity arises of securing reform or added legislation in these fields by further amendment of the constitution and results in the writing into the organic law of the state of what are, in effect, merely statutes. The Constitution of California in its present form contains the entire law governing the initiation of legislation, amounting to over two thousand five hundred words;[1] the law for the framing of freeholders' charters in counties, three thousand words;[2] the law for the framing of freeholders' city charters, two thousand five hundred words;[3] the law organizing and defining the powers of the State Railroad Commission, one thousand eight hundred words.[4] Such laws are placed beyond the competence of the legislature to amend, and every necessary modification can only be accomplished by further constitutional amendments. Such a sit-

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[1] Art. IV, § 1.
[2] Art. XI, § 7½.
[3] Art. XI, § 28.
[4] Art. XI, §§ 22, 23.

uation defeats the very purpose of an organic law and destroys the distinction between constitutional law and statute law.[5]

The adoption by many states of the initiative and the referendum still further reduces the position of the legislature, and has even created the assumption in many minds that representative legislative bodies are superfluous. The adoption of a referendum provision as a safeguard against injudicious or unpopular legislation would logically call for the removal of constitutional prohibitions on the legislature formerly imposed for the same end, but so far as I know, no movement in this direction has begun.

But the most striking exhibition of legislative decline, both in the nation and in the American states, is seen in its subordination to the chief executive. The old "doctrine of separation of powers," like so many other political formulas to which the American mind tenaciously holds, is completely fictitious when tested by the realities of our government. The executive no longer simply administers; he is held responsible by state and nation for the legislation enacted during his administration. It is not merely a matter of his use of the veto; it is rather a question of his power of initiation and direction of legislation, and both at Washington and at our state capitols the really significant projects of law are embodied in what we call "administration measures," which originate with the executive and have his active support and solicitude. Mr. Taft, at the commencement of his administration, attempted to stand upon the old theory that presidential dictation to Congress is an unwarranted interference with congressional independence, but his attitude, which was quite correct theoretically, greatly irritated the nation, and established his reputation as a weak executive. On the other hand, the great achievements by the governors of many states in the last fifteen years, from Governor Hughes of New York to Governor Johnson of California, have been due to the leadership of these men in the legislature and their capacity to secure the enactment of necessary reforms into law.

There is little doubt that all of these changes, the limitation of legislative power by constitutional amendment, the adoption of the initiative and referendum, the growth of gubernatorial domination represent real accomplishments in the process of our political development, and that they have transformed our state governments decidedly for the better. They have all developed in response to a

[5] Some Tendencies in Constitution Making, 2 California Law Review, 203.

determination of the people to protect the public interest against private rapacity, and they are coincident with a most encouraging development of state activities. Nevertheless their result has been to reduce the quality and character of our state legislatures and to disturb confidence in the doctrine of representative government. That doctrine, as expounded for example in the classic pages of Walter Bagehot or John Stuart Mill, is one of the noblest expressions of political judgment. It rests upon the faith that voters are capable of choosing as their representatives men somewhat above the level of their own class in sagacity and public spirit, and that while popular judgment may err as respects measures, in the long run, it is correct as to men; that men elected to the position of law-makers act under an increased sense of public responsibility, that discussion, the meeting of opposing points of view, is vital to the law-making process; that a proper recognition of the interests of all classes of the community is only gained by conference in a body representative of all these classes.

The earlier theory current in the time of our revolutionary framers of government held further that the legislature would be an effective and wholesome restraint against the dangers of executive power. In countries with "parliamentary" or "ministerial" government, where the executive is in effect a committee of the legislature, executive responsibility is theoretically secured by the constant necessity of rendering account to the legislative body of all matters, both of administration and politics; but the American system of "presidential" government separates the executive from the legislature and makes the executive irresponsible except to the people at periodical elections. Only in certain specific matters, as for example the use of pardoning power, do our state constitutions require the governor to give a report to the legislature of his performance, and in these cases there is no reversal of his action.

The up-shot of the matter is that while the moral character of the men who make up our legislatures has improved in the last fifteen years, so that these bodies are no longer dominated either by politicians of the old stripe, or by mere creatures of "big business" and "bad business," our most representative citizens are coming to feel that the office of legislator is devoid of opportunity and dignity. The legislature which assembles in Sacramento as this article goes to press will contain a disappointingly low proportion of men who have had the advantage of previous experience in that body.

It is undeniable that much of the decline in public esteem and

of the failure of state legislatures to do their tasks effectively rests upon themselves. Yet one of the most serious defects of a legislator's position is beyond his control, and results from the vicious American theory that the members of legislative bodies must in all cases be actual residents of the districts they represent. This is one of those numerous points where a people who pride themselves upon their practical sense have bound themselves rigidly to an unwholesome theory. No legislative body so far as I know outside of America, and American dependencies like the Philippines, where the same unfortunate notion has been engrafted, thus destroys the freedom of the legislator. The effect is not only to render it impossible for the people freely to choose the best and most representative individuals to be found in the state, but binds the political career of a man in a legislature to the prejudices of a majority of his immediate constituents. A member of the legislature who finds himself conscientiously at variance with the wishes of the majority of the people who have elected him, has three courses open; he may yield his own judgment and conscience to theirs, abandon political life, or change his home. The first alternative is the one almost invariably chosen with the result that a member subordinates what he may know to be the interests of the state to the local interests of the district that chooses him. He sacrifices the esteem and confidence of the people of the state as a whole in order that he may retain the political support of the voters of his own district. This situation with all the unfortunate results that have grown out of it, lies at the root of the lack of public confidence in members of legislatures and at the bottom of the general confidence felt in a state governor. For he alone of all the men participating in the enactment of law can afford to ignore the petty interests of certain localities and can fairly claim to put the interests of the state as a whole above those of any locality. This position as the exponent and representative of "all the people" is the real explanation of the source of presidential and gubernatorial power, and of the relative weakness of Congress and the state legislatures.

But legislatures themselves are wholly responsible for their failure to control the volume of projects of law and to limit the exercise of their august power to matters deserving statutory enactment. Nothing has gone further to destroy the position of state legislatures than the ridiculous profusion with which they have

permitted the unrestricted introduction and passage of bills. The California legislature of 1911 saw introduced into the Assembly 1588 bills and into the Senate 1290, a total of 2878 projects of law. Of this number of bills 753 actually became laws or amendments to the Codes. This was considered to be an unprecedented and amazing license of the legislative power, but it was exceeded by the performance of the legislature of 1915, which saw introduced a total of 3061[5a] bills, constitutional amendments and resolutions, over a thousand of which passed the legislature and 771 of which became laws.[6] Such practice as this defeats the very purpose of legislative bodies and encourages the dangerous inference that legislation may be an individual or personal function. It produces a demoralization of the legislative session in which anything is possible, and frames a spectacle which destroys confidence. It justifies Mr. Roosevelt's condemnation expressed in the Outlook in 1913 that "state legislatures simply spawn bills by the gross like female shad." Legislatures must take steps to completely reform their procedure as the first step to do their task well and to regain public regard. Classical historians inform us that in the Greek state of Locri there was a rule that whoever proposed a new law should do so with a rope around his neck, and if his proposal was rejected he should be strangled on the spot. This summary provision of the Locrian constitution may at least serve to warn our legislatures that the law

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[5a] Joint Final Calendar of Legislative Business, Cal. Legislature, 1915.

[6] "Our legislatures are for the most part limited to short sessions and the terms of the members of the House do not as a rule cover more than one session. Generally, an overwhelming majority of the House of Representatives are first-termers, and without legislative experience. The same thing is often true of the Senate.

"And yet, legislatures so composed, add something like 25,000 pages to our statute books each year. In Massachusetts this year not less than 2,500 bills were introduced. In Pennsylvania, 2,100; in Wisconsin, 1,200; and in the State of Washington, 1,200.

"In 1911 the Session Laws of California was a book of 2,000 printed pages; the Sessions Laws of Connecticut, 360 pages; Idaho, 810 pages; Indiana, 705 pages; Maine, 829 pages; Massachusetts 1,100 pages; Michigan, 533 pages; Missouri, 451 pages; New Jersey, 834 pages.

"The Session Laws of Kansas for 1913 is a book of 594 pages and contains 376 laws and resolutions. Excluding appropriation bills, 36 important new laws were passed. The rest were either local acts, amendments, or were trivial in their nature. The last Kansas legislature was in session 49 days or parts of days, consequently something like 7 laws passed both Houses each day.

"It is hardly possible for a member to read 7 enactments a day, and it is an impossibility for him to comprehend and understand them."

—Governor George H. Hodges of Kansas, in address at Colorado Springs before the Conference of Governors in 1913.

proposing and enacting power must make its sanctity respected or the legislature itself will be imperiled.

The legislatures not only defeat their purpose by multiplicity of bills, but they render good legislation impossible by the voluminous character of the statutes themselves. Every consideration recommends that a law should be concise, brief and exact. The great legislative enactments from Roman times down are no less marvelous for their conciseness than for their accuracy. No bill is in shape for enactment until it has been hammered into the smallest possible compass. Nothing should appear in a law that is not an essential to its interpretation and enforcement. This is a commonplace of political science and yet some of our laws defy mastery or comprehension by their very length. The last ballot law enacted by the state legislature, which should be understood by every voter and must be understood by every polling officiai, contained over thirty-six thousand words.

In continental jurisprudence a clear distinction is drawn between a "law" (*loi*) which embodies the essential purpose and policy and which is a parliamentary enactment, and subordinate measures designed simply to carry out the provisions of the law and which may require modification from time to time. These "ordinances" (*decréts* and *arrêtés*) in France or European governments generally are the work of the executive, duly authorized to perform this function. There is a certain limited development of the ordinance power in our federal and state governments. Congress frequently entrusts such power to the president, and state boards such as the Civil Service Board or the Board of Health are authorized to frame regulations having the force of laws. If our statutes are to enjoy any permanency and escape that constant tinkering which destroys their sanctity, our legislatures must find means generally to relieve themselves of burdensome, trivial and minor details. Only so may our statute law be reduced to scientific and comprehensible proportions.

The most radical proposal for the reconstitution of state legislatures is to adopt for state government the "commission form," concentrating both the executive and legislative powers of the state in a small commission after the manner of government in certain American cities. In discussing this proposition we do not need to consider the defects of commission organization for administrative work, although these defects are real and apparent, for

we are not concerned with the operation of commission government as an executive. The objection to commission government on its legislative side, which is all we have here to consider, is, that a commission is too small a body to fulfill the demands of representative government. This is even true of the commission government of large cities. Five men chosen at large do not form a representative legislative or policy-deciding body for a city of a quarter of a million or even of a hundred thousand souls, and no such body could pretend to represent the varied interests of a state. The proposition to concentrate the legislative power in a commission is akin to that to make of the legislature a body of experts. There is a large place and a great need for the expert in legislation, but his proper place is in the initial drafting and shaping of laws, not in their final enactment. The final enactment of laws in a democracy is essentially a popular act, and under representative government is discharged by representatives from all classes of the people. Legislation by experts might for a while give us carefully framed and in a measure judicious laws, but we would not have representtative government.

To entrust the legislative power to a small body of experts is to entirely disregard the historic character of parliaments, which have always contained bodies of laymen chosen from one or several classes of the people with the power to sit in legislative judgment upon the achievements and performance of the government, to vote the necessary grants of funds and impose taxation, and finally to settle the large questions of policy and give validity to laws. I hold strongly to the view that in a democracy a legislature must contain men chosen by all elements of society and capable of interpreting their needs and reflecting their views. In a democracy disfranchisement of any class, even on grounds of illiteracy or dependence, is a dangerous expedient, because it creates a class of people outside the state and prepares a ground for attacks upon the state itself.

I feel that proposals for commission legislatures or for legislatures of experts arise from a confusion between those two broad branches of government which have been defined by Professor Goodnow as "politics" and "administration." Politics embraces legislation, the determination of public policies, the voting of funds and the imposition of taxation. This, in a representative government, is the function of the nation through its representatives, and must of necessity be sanctioned by laymen. In its last

analysis it is indisputably a lay responsibility. Administration has to do withe the carrying into effect of the policies decided by politics, the conduct of the state's business, the operation of its executive machinery. It may be entirely divorced from politics and from all partisan and political issues. Every considera-ation recommends that this side of government be entrusted to the best qualified. Here is the expert's place and here in the best government he is considered indispensable. In other words, while politics and political power in a state, organized according to American ideals, should be based upon the most democratic principles, administration, in America no less than anywhere else in the world, should be as aristocratic as possible, using the term aristocratic not in the sense of having reference to any privileged class but in the highest use of the word,—administration by the best qualified. I would reject absolutely then, as undemocratic and unrepresentative, all proposals for a commission legislature or an expert body of legislators, and in constituting a legislature I would hold to the simple principles that it must be large enough to satisfactorily represent all parts of the state and if possible all respectable elements of society. A district entitled to representation should not be so large that a man standing there for election could not become acquainted with all its communities and be known by sight and voice to its inhabitants. Personal impression is indispensable to the proper choice of a representative to a legislative body.

There is much less, however, that can be said in objection to the proposition now current in many states to reduce the state legislature to a single chamber. The bicameral system finds its most useful application in states with a federal system where it is desirable to constitute one house upon the basis of population and the upper house, or senate, for the representation of the members themselves of the federation. This device which was an American discovery and made possible the formation of our Union, has been repeatedly imitated, and the American senate finds its counterpart in the upper house of the German Empire, the Dominion of Canada, the Australian Commonwealth, the Union of South Africa, and Mexico and the Argentine. In other governments the upper house is usually a conservative body perpetuating the power of certain privileged classes, or, resting upon a higher requirement of age or property qualification, is designed to act as a restraint upon the more popular branch of the legislature. But in the states of the American union there is little to justify the bicameral legis-

lature except the argument that it furnishes a double consideration of legislative proposals. We owe the existence of our state senates to the fact that in the colonial legislatures before the Revolution the governors generally had advisory councils which assisted them in executive responsibilities and advised upon the exercise of the veto, and these councils became in the early state constitutions upper legislative houses, in four cases chosen by the lower house itself as the city aldermen were chosen by the municipal council of an English borough; while seven states, anticipating the federal constitution, gave to their upper houses the name of "senate." Pennsylvania alone of the thirteen original states contented herself in the beginning with a single chamber. The immense influence of the federal pattern of government imposed itself, however, from the start upon state constitutions and bicameral state legislatures have prevailed, and for a century there has been no exception among the states of the American union.

In the federal countries to the north and the south of us, however, the single chamber legislature is general. Under the federal constitution of Mexico, first adopted in 1823, each state (of which there are now twenty-seven) has its own legislature, and these legislatures consist of a single chamber. In the early history of Mexican state government an upper chamber or senate was frequently considered, but its creation generally postponed in the interests of economy. In the course of years, however, the unicameral system has thoroughly established itself and everywhere prevails. In spite of the faulty working of the Mexican constitutional system, there is much that the student of political science may learn from the conduct of Mexican state government. These state legislatures, or *congresos,* are small, usually consisting of from only nine to fifteen members. The deputies are selected by districts and for terms that vary from one to four years. An alternate (*suplente*) is elected at the same time with the deputy and takes his place in case of death, retirement or absence. While the size and population of a Mexican state make bodies so small as the Mexican legislatures are, more nearly representative than would be the case in the American union, nevertheless the disadvantages of their small size are apparent. A body of nine to fifteen members is more easily controlled or dominated by executive authority than a legislature of greater numbers. It lacks the courage of a larger and more representative assembly. Its deliberations do not take on the character of public debate and its work tends to be dispatched in the manner

of a committee. While these and other arguments could be advanced for enlarging the membership of these legislatures, I doubt if any opinion in Mexico or among Mexican students of their government would champion the plan of two chambers.

The provinces of the Dominion of Canada have likewise tended toward a single chamber system. Two of them, Quebec and Nova Scotia, still retain an upper house. The others, either by change of their original institutions or, on their first adoption of provincial constitutions, have settled upon the unicameral system.[7] Canadians generally seem to have decided that the single-chamber provincial legislature is not only more economical but more responsible and altogether more satisfactory than a bicameral legislature. It must be said, however, in regard to their law-making process, that as is usual under the parliamentary system of government, most legislation is introduced by the ministry, and in this manner careful preliminary study of bills and a double deliberation in council of ministers and in parliament is secured.

As against the theory of the check of one house upon the other, the advocate of single chambers argues that this is not an unmixed advantage, as it frequently disposes one chamber to avoid responsibility or the tedium of close investigation by passing doubtful or ill-considered measures on to the other branch of the legislature, whereas in the closing days of the session the action of two houses seldom secures the careful consideration of any but the most important measures.

There is less to recommend the dual organization of state legislatures because of the fact that in American state government there has been little or no specialization of function between them. The natural division would be to accord to the lower house the origination of appropriations and financial measures, while leaving to the senate the general determination of state policies and the review

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[7] The following tabulated statement shows the size of the legislative bodies of those provinces of the Dominion of Canada which have the unicameral system.

PROVINCE.	LEGISLATURE.	MEMBERS.	TERM.
Alberta	"Legislative Assembly"	56	?
British Columbia	"Legislative Assembly"	42	4 years
Manitoba	"Legislative Assembly"	49	5 "
New Brunswick	"Legislative Assembly"	48	5 "
Ontario	"Provincial House of Representatives"	111	4 "
Prince Edward Island	"Legislative Assembly"	30	4 "
Saskatchewan	"Legislative Assembly"	54	5 "

and discussion of executive action; but so great is the attraction of the money-appropriating function that in the State of California, at least, the senate has secured the main control of appropriations, while the assembly, necessarily composed of younger and less experienced men, finds that even in financial matters it is relegated to a position of less consequence and less power.

There are sound reasons for believing that American state legislatures would gain in responsibility, in attractiveness as fields of effort, as well as in mere economy, if they were reduced to a single chamber. It is nothing but the extreme conservatism of the American disposition in dealing with established institutions that has prevented the trial of a single-chamber legislature. Sooner or later some American state will inaugurate this innovation, and the chances are in favor of its exhibiting superiority over the present dualism.

There is room for great difference of opinion as to the proper size and method of choice of such a single chamber, but I am of the opinion that no single state legislative body should be smaller than the present California senate, which consists of forty members. Forty members is an almost ideal body for profitable and dignified public discussion. It is just about the size of the American senate in the days of its greatest debates. On the other hand the imperial proportions of the State of California and the extraordinary variety of occupations and interests which its vast domain presents, recommend a single legislative body of the size of the present lower house, or eighty members.

Four years is not too long a term for which to choose a legislative member, although the conservatism of a four-year term may be modified by electing half of the body every two years, and if this were done, in order that all districts might have the opportunity of expressing their judgment at each election, it would perhaps be advisable to retain the senate districts as the basis for election, and accord to each one two members to be elected alternately every two years for a four-year term.

Such a body should meet annually. Biennial meetings, or in some cases less frequent sessions, were adopted largely to check undue legislation, but the device has proved absolutely ineffective. An annual session not only permits the more timely consideration of legislation that is actually urgent, but makes it easier to defer partially considered measures until the following session. There is

far less pressure upon a legislature which knows that it will convene again within the space of eight or nine months to rush through a vast number of hastily prepared and quite unconsidered statutes than is the case with a legislature one-half of which goes out of existence at the end of the session, and which will not reconvene for nearly two years.

An American legislature, constituted of a single chamber might well adopt an institution which has proved its value in several countries, and is known as the "permanent deputation" or the "permanent commission." This institution appears to have originated in Belgium and to have had an early origin in the practice of the Estates of the Low Countries. As constituted in modern Belgium the permanent deputation is a committee of six members chosen by each provincial council out of its membership. Between the sessions of the provincial council it plays an important part in provincial administration. Its counterpart exists in a number of modern governments, including, rather singularly, Mexico, where the Federal Congress on adjournment of session elects a permanent deputation of seven senators and eight representatives, upon whom the Constitution and laws confer important powers. Each Mexican state also has a permanent deputation of the state congress.

The uses of such a body in the State of California might be several. Chosen before the adjournment of each session by the legislature out of its own members, and composed of a number of men with the qualifications and the leisure to give continuous attention to the affairs of the state, such a standing commission might be a permanent committee upon legislation, reviewing the action of the legislature at its past session and anticipating its action during the coming session. It might reconsider projects of law left unenacted, and examine new projects sent in by members of the legislature for future consideration. The legislature might well accord to this deputation an unlimited prerogative of introducing at the opening of the session new bills, while at the same time restricting to a minimum the number of bills which a private member might introduce other than through the permanent commission. This would be one practicable way of limiting the unbridled license which overwhelms our legislature with projects of law, and which has been sufficiently commented upon. To it might also well be entrusted a considerable ordinance power, the power to frame subordinate legislation consistent with statutes of the legislature and

designed to carry out the provisions of these statutes, which, upon receiving the approval of the governor, would have the force of law. This would relieve our laws of the immense mass of details which incumber them and would give a flexibility much to be desired. The legislative reference bureau established by the last legislature should be administered under this permanent commission.

Such a permanent commission might also, in the absence of any "cabinet body" in state administration, form an advisory council to the governor, particularly with reference to the operation and execution of the laws, and it might perform a service of immense value by close participation with the governor in the framing of what we call "administration measures."

The old theory of the separation of powers is a sham, long discarded in actual practice, and the American people will gain in certainty of effort if they fairly recognize the truth. The state governor and the state legislature can not be disassociated in the enactment of legislation. Rather must they be drawn even more closely together. The public interest does not lie in the direction of reducing the power and influence of the governor. He should on the contrary be made the actual head of the state's administrative system, and as long as the American preference runs as irresistibly as it does toward the establishment of strong men in office there will be no diminution in his power with the people or the people's representatives. But what is needed, is to restore vitality and dignity to the legislative branch, constituting it upon practical and not theoretical lines, and raising it to a position of constant and active participation in the government of the state.

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